Malayan Nurses Union v Sykt Perniagaan Cuepacs Bhd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1050 OF 2004
SULONG MATJERAIE, KANG HWEE GEE AND CLEMENT SKINNER JJCA
28 JUNE 2010

Civil Procedure — Execution — Application to enforce order — More than six years lapsed from date of order — Whether appellant needed to first obtain leave to enforce judgment — Whether High Court judge right to refuse appellant leave to enforce judgment obtained — Rules of the High Court 1980 O 46 rr 1 & 2(1)(a)

Land Law — Charge — Order for property to be freed from encumbrances — Appellant order over charged property — First respondent chargor wound up and liquidator appointed to liquidate assets — Appellant refused leave to enforce judgment — Whether High Court judge was right to have refused appellant leave to enforce judgment — Whether High Court judge was right to have granted second respondent bank leave to commence foreclosure proceedings — Whether unregistered charge void against second respondent bank

On 27 October 1981, the Malayan Nurses Union ('the appellant') had entered into a sale and purchase agreement ('the SPA') with Sykt Perniagaan Cuepacs Bhd ('the first respondent') to purchase the respondent's property situated in Cheras, Kuala Lumpur ('the property'). At the time of the sale, the property had been charged to Bank Buruh (M) Bhd, the predecessor of Affin Bank Bhd ('the second respondent'). On 3 October 1983, the appellant had paid the first respondent the full purchase price of the property but the latter had failed to transfer the property to the appellant. Thereafter, the appellant commenced a civil action against the first defendant and obtained, inter alia, an order dated 2 September 1992 for specific performance of the SPA, for the property to be freed from all encumbrances and for it to be registered in favour of the appellant. On 24 August 1994, the first respondent was wound up by the court and subsequently a provisional liquidator was appointed to liquidate its assets. Some eleven years later the appellant sought to enforce the order dated 2 September 1992. The appellant's application for leave was heard together with the second respondent bank's earlier application for leave to commence foreclosure proceedings on the charged property. The High Court refused to grant the appellant leave to enforce the judgment it had obtained against the first respondent, but granted the second respondent bank leave to commence foreclosure proceedings. This was the appellant's appeal against the decision of

the High Court. The appellant submitted that the High Court judge had erred when he refused the appellant leave to enforce the judgment that it had obtained. The appellant further submitted that s 108(1) of the Companies Act 1965 ('the Act') would render the unregistered charge void.

Held, dismissing the appeal with costs:

(1) Since more than six years had lapsed since the date of the judgment obtained by the appellant against the first respondent, it needed to first obtain leave from the civil court under O 46 r 2(1)(a) of the Rules of the High Court 1980 to enforce the judgment. However, the appellant had not applied for such leave and on this ground alone the appellant's appeal should be dismissed (see paras 7–8).

(2) In order to enforce the order of court obtained by the appellant, 'to forthwith have the property freed from all encumbrances and execute a memorandum of transfer of the property' to the appellant, the liquidator would have to discharge the charge by paying off the sum owed under the charge to the second respondent bank. However, the liquidator could not perform this function due to the insolvency of the first respondent (see para 13).

(3) Although s 108(1) of the Act may have rendered the unregistered charge void as against the second respondent bank, s 108(2) of the Act conferred upon the chargee the right to be paid immediately by the chargor of the money secured under the charge. Thus, s 108(1) of the Act would not absolve the liquidator from having to pay the money secured by the charge as the second respondent bank would still be protected by an equitable charge on the property (see para 17–20).

(4) The question of whether an order of sale should be granted by reason of the bank's seeming incapacity under s 108(1) of the Act should be heard at a full hearing on the merit and not at this leave stage (see para 24).

[Bahasa Malaysia summary

Pada 27 Oktober 1981, Kesatuan Jururawat Malaysia ('perayu') telah memasuki perjanjian jual beli ('PJB') dengan Sykt Perniagaan Cuepacs Bhd ('responden pertama') untuk membeli hartanah responden yang terletak di Cheras, Kuala Lumpur ('hartanah'). Pada masa jualan tersebut, hartanah telah digadaikan kepada Bank Buruh (M) Bhd, yang dahulunya Affin Bank Bhd ('responden kedua'). Pada 3 Oktober 1983, perayu telah membayar kepada responden pertama harga belian penuh hartanah tersebut tetapi responden kemudiannya gagal untuk memindah milik hartanah tersebut kepada perayu. Kemudiannya, perayu memulakan tindakan sivil terhadap defendan pertama dan memperolehi, antara lain, perintah bertarikh 2 September 1992 untuk pelaksanaan spesifik PJB, untuk hartanah tersebut bebas daripada kesemua halangan dan untuknya didaftarkan memihak perayu. Pada 24 Ogos 1994,

A responden pertama digulung oleh mahkamah dan kemudiannya likuidator sementara dilantik untuk melikuidasi asetnya. Sebelas tahun kemudiannya perayu memohon untuk menguatkuasakan perintah bertarikh 2 September 1992. Permohonan perayu untuk kebenaran didengar bersama permohonan terdahulu responden kedua bank untuk kebenaran memulakan prosiding B perampasan atas hartanah yang digadai tersebut. Mahkamah Tinggi menolak daripada memberikan perayu kebenaran untuk menguatkuasakan penghakiman yang diperolehinya terhadap responden pertama, tetapi memberikan kebenaran kepada responden kedua untuk memulakan prosiding perampasan. Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi. C Perayu berhujah bahawa hakim Mahkamah Tinggi tersilap apabila beliau menolak daripada memberikan kebenaran untuk menguatkuasakan penghakiman yang diperolehinya. Perayu kemudiannya berhujah bahawa s 108(1) Akta Syarikat 1965 ('Akta') akan menyebabkan gadaian yang tidak berdaftar tersebut terbatal.

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Diputuskan, menolak rayuan dengan kos:

(1) Memandangkan lebih daripada enam tahun telah luput semenjak tarikh penghakiman diperolehi oleh perayu terhadap responden pertama, ia perlu untuk pada mulanya memperolehi kebenaran daripada mahkamah E sivil di bawah A 46 k 2(1)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 untuk menguatkuasakan penghakiman. Walau bagaimanapun perayu tidak memohon kebenaran sedemikian dan atas alasan ini sahaja rayuan perayu patut ditolak (lihat perenggan 7–8).

F (2) Untuk menguatkuasakan perintah mahkamah yang diperolehi oleh perayu, 'to forthwith have the property freed from all encumbrances and execute a memorandum of transfer of the property' kepada perayu, likuidator hendaklah melepaskan gadaian tersebut dengan membayar jumlah yang dihutang di bawah gadaian tersebut kepada responden G kedua bank. Walau bagaimanapun, likuidator tidak dapat melakukan fungsi ini kerana ketaksolvenan responden kedua (lihat perenggan 13).

(3) Walaupun s 108(1) Akta mungkin menyebabkan gadaian yang tidak didaftar tersebut tidak sah terhadap responden kedua bank, s 108(2) Akta memberikan kepada pemegang gadaian hak untuk dibayar dengan H segera oleh penggadai wang yang dijamin di bawah gadaian tersebut. Oleh itu, s 108(1) Akta tidak akan membebaskan likuidator daripada membayar wang yang dijamin oleh gadaian tersebut kerana responden kedua bank akan masih dilindungi oleh gadaian ekuiti ke atas hartanah (lihat perenggan 17–20).

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(4) Soalan sama ada perintah jualan patut diberikan atas alasan ketidaklayakan bank di bawah s 108(1) Akta patut didengar dipendengaran penuh atas merit dan bukan pada peringkat kebenaran ini (lihat perenggan 24).]

Notes

For cases on charge in general see 2(1) *Mallal's Digest* (4th Ed 2011 Reissue) paras 2506–2870.

For cases on execution in general see 2(1) *Mallal's Digest* (4th Ed 2010 Reissue) paras 2921–3073.

Cases referred to

Murphy & Anor v Wright [1992] 5 BPR 11, CA (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 s 50
Companies Act 1965 ss 108(1), (2), 226(3)
National Land Code s 340
Rules of the High Court 1980 O 46 rr 1, 2, 2(1)(a)

Appeal from: Winding Up No D3–28–283 of 1993 (High Court, Kuala Lumpur).

Rajinder Singh (Puthucheary) for the appellant.
Chin Tzi Song (Ariffin & Partners) for the first respondent.
Andrew Chiew (Lee Hishammuddin Allen & Gledhil) for the second respondent.

Kang Hwee Gee JCA (delivering judgment of the court):

[1] This is an appeal by the appellant, Malayan Nurses Union ('the appellant') against the refusal of the High Court to grant the appellant leave to enforce a judgment which it had obtained against Sykt Perniagaan Cuepacs Bhd (in liquidation), pursuant to s 226(3) of the Companies Act 1965.

[2] Sykt Perniagaan Cuepacs Bhd ('Cuepacs') had been wound up by the court on 24 August 1994. Subsequently a provisional liquidator Messrs Deloitte Kassim Chan ('the liquidator') was appointed to liquidate its assets. The leave sought for by the appellant arose from the purchase by the appellant of a property known as No 15 Jalan Pakis Satu, Cheras, Kuala Lumpur, from Cuepacs, the full purchase price of which was fully settled on 3 October 1983 before Cuepacs was wound up.

[3] The said property was at the time of the sale to the appellant encumbered, having been charged to Bank Buruh (M) Bhd on 28 May 1981. The property

now vests on the second respondent Affin Bank Bhd ('the bank') vide a vesting order dated 18 December 2000 pursuant to s 50 of the Banking and Financial Institutions Act 1989.

[4] The appellant's application for leave was heard together at the High Court with an earlier application ('encl 54') of the bank for leave under the same s 226(3) of the Companies Act 1965 to commence foreclosure proceeding on the charged property. The bank's application was allowed by the learned judge.

[5] We read the order dated 2 September 1992 that the appellant obtained from the court in civil action No S4–22–415 of 1992. We note that the appellant only sought to enforce the order some eleven years later without obtaining leave as required under O 46 r 2(1)(a) of the Rules of the High Court 1980 which read:

> A writ of execution to enforce a judgment or order may not issue without the leave of the Court in the following cases, that is to say:
>
> (a) where six years or more have lapsed since the date of the judgment or order;

[6] Under O 46 r 1 a 'writ of execution' is broadly defined to include a writ of seizure and sale, a writ of possession and a writ of delivery, and in our view, should include an order of specific performance.

[7] Without first obtaining the leave of the civil court to enforce the judgment which had lapsed under O 46 r 2 the application before the learned judge was therefore incompetent.

[8] We accept the submission of counsel for the bank that on this ground alone the appellant's appeal should be dismissed.

[9] Nevertheless for completeness we also went on to examine the merit of the appellant's application for leave to enforce the judgment.

[10] First, we examined the order obtained by the appellant which read:

> (a) an Order for specific performance of the Sale & Purchase Agreement dated 27th October, 1981 by the Defendant to forthwith have the property freed from all encumbrances and execute a Memorandum of Transfer of the said property held under Geran 31216, Lot 7175, Mukim Cheras, Daerah Ulu Langat and cause the same to be registered in favour of the Plaintiff, failing which the Senior Assistant Registrar of the High Court be empowered to execute all necessary documents;

(b) the recovery of the sum of $5,281.51;

(c) interest on the sum $5,281.51 at the rate of 8% per annum from the 16th day of September, 1983 to date of full settlement;

(d) costs.

[11] We note that the other sought for relates to a property which had originally been charged to Bank Buruh (M) Bhd, (the predecessor of the present bank), some ten years before the appellant completed its purchase. Under s 340 of the National Land Code, the bank enjoys indefeasibility of interest.

[12] The record shows that the appellant was aware of the subsisting legal charge held by the bank before the appellant commenced Civil Action No S4–22–415 of 1992. The judgment obtained by the appellant only ordered Cuepacs to *forthwith have the property freed from all encumbrances*. The bank was not a party and no order was specifically made to compel it to discharge the charge of the property.

[13] It is clear that to enforce the order of the court *to forthwith have the property freed from all encumbrances and execute a memorandum of transfer of the said property*, the liquidator would have to discharge the charge by paying off the sum owed under the charge to the bank, a function which the liquidator cannot perform in view of the insolvency of Cuepacs.

[14] Next, we examined s 108(1) of the Companies Act 1965 which renders an unregistered charge void as against the liquidator and any creditors of the company. It read:

> Subject to this Division where a charge to which this section applies is created by a company, there shall be lodged with the Registrar for registration within thirty days after the creation of the charge a statement of the prescribed particulars, and if this section is not complied with in relation to the charge, the charge shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company.

[15] But s 108(2) read:

> Nothing in subsection (1) shall prejudice any contract or application for repayment of the money secured by a charge and when a charge becomes void under this section the money secured thereby shall immediately become payable.

[16] There is a dispute as to whether the second respondent had registered the charge with the Registrar of Companies (now the Companies

Commission). We examined the record and were unable to find that the subject property, known as No 15 Jalan Pakis Satu, Cheras, Kuala Lumpur, had been registered.

[17] We accept the submission of counsel for the appellant that s 108(1) may have rendered the unregistered charge void as against the bank, but in the same breath s 108(2) preserves *any contract or application for repayment of money secured by a charge* and conferred upon the chargee the right to be *paid immediately* by the chargor of the money secured under the charge.

[18] The fact that the charge may have been rendered void under s 108(1) against the bank would not therefore absolve the liquidator from having to pay *the money secured thereby* to the bank in due compliance of s 108(2) of the Act.

[19] We therefore accept the reason proffered by the liquidator that it would not be able to comply with the order of specific performance to redeem the property — for to do so it would still have to settle the sum owed on the charge to the bank, despite the provision of s 108(1) of the Act.

[20] We would go so far as to express our view that notwithstanding the operation of s 108(1) of the Act which renders the charge under the National Land Code void, the bank would still be protected by an equitable charge on the property.

[21] We are persuaded by the majority decision of the Court of Appeal of the Supreme Court of New South Wales in *Murphy & Anor v Wright* [1992] 5 BPR 11, at p 734 (Priestley, Handley, and Sheller JJA; Sheller JA dissenting) that an exercise of an option in an agreement to enter a caveat on a land upon a default on the repayment of a loan creates an equitable charge on a 'Torren's title' land — a fortiori, in the instant case where a statute (s 108(2) of the Companies Act 1965) preserves the 'contract or any repayment of money secured under a charge' and confers a right on the chargee the right to be paid immediately.

[22] The position would be entirely different had the property been free from any legal charge when the appellant purchased it, in which case Cuepacs would be relegated to a bare trustee of the appellant of the property after the full purchase price was paid. The liquidator would under the circumstances, be bound to effect a transfer of the property to the appellant notwithstanding that Cuepacs had been wound up.

[23] The learned High Court judge was right to have refused the appellant leave to enforce the judgment that it obtained. He was also right in granting the bank leave to commence foreclosure proceeding — for ex facie the bank is still the registered chargee.

[24] The question of whether an order of sale should be granted by reason of the bank's seeming incapacity under s 108(1) of the Companies Act 1965 should be heard at a full hearing on the merit and not at this leave stage.

[25] For the foregoing reasons we dismiss the appeal with costs.

[26] Both Justice Sulong Matjeraie and Justice Clement Allan Skinner have read the draft of this judgment and have agreed with the views expressed therein.

Appeal dismissed with costs.

Reported by Kohila Nesan